Supreme Court, U.S.
FILED

(1) 94 1059 DEC 14 1994

OFFICE OF THE CLERK

No. 94-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

RUSSELL CALAMIA,

Petitioner,

v.

HARRY K. SINGLETARY, JR.
Secretary, Florida Department
of Corrections,

Respondent.

Petition For Writ of Certiorari to the
Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277(1) (i), Florida Statutes (Supp. 1992), to offenses committed before the effective date of the statute and the effect of the passage of section 944.278, Florida Statutes (1993) violate the prohibition against ex post facto laws in Article I, Section 10, Clause 1 of the United States Constitution.

2. Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277(1) (i), Florida Statutes (Supp. 1992) and Section 944.278 Florida Statutes (1993), is an unconstitutional violation of the prohibition against Bill of Attainder contrary to Article I, Section 10, of the United States Constitution.

3. Whether Section 944.277(1) (i), Florida Statutes (Supp. 1992) and Section 944.278 Florida Statutes (1993), which destroyed Petitioner's liberty interests in granted provisional credits, destroyed his liberty interest in release on his provisional release date, and destroyed his liberty interests in the procedures for revocation of his liberty interest, on its face or as applied to the Petitioner deprives the Petitioner of liberty and property without fair notice and procedure in violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT CONCERNING THE PARTIES

The parties to the habeas corpus proceedings before the Florida Supreme Court were Petitioner, RUSSELL CALAMIA and Respondent, HARRY K. SINGLETARY, JR., in his official capacity as Secretary for the Florida Department of Corrections.

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OPINIONS BELOW

The opinion of the Florida Supreme Court in the underlying cause is set out in Appendix to this petition at A1.

JURISDICTION

The opinion of the Florida Supreme Court (A1) was entered on September 15, 1994. This Petition therefore is timely. Rule 13.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 10, cl. 1 Constitution of the United States:

"No State shall . . . pass any Bill of Attainder . . ."

"No State shall . . . pass any ex post facto law. . ."

Amendment XIV, Section 1, Constitution of the United States:

No State shall...deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

On July 27, 1994 the Petitioner filed a petition for writ of habeas corpus before the Florida Supreme Court. The Florida Supreme Court denied the petition for a writ of habeas corpus on September 15, 1994. (A1).

The petition raised three issues: whether the retroactive application of exclusions from eligibility for, and cancellation of, provisional gain time credits violates the Ex Post Facto Clause of the United States Constitution, whether the cancellation of provisional credits is an unconstitutional violation of the prohibition against bill of attainder and lastly, whether the cancellation of provisional credits without notice or hearing violates the Petitioner's due process rights under the United States Constitution.

The verified petition relied on the following facts. On or about January 28, 1986, Petitioner was charged by indictment with one count of first degree murder, a capital felony punishable by life imprisonment or death, allegedly committed on January 3, 1986. In December of 1987 a jury was selected for Petitioner's trial and the trial began shortly thereafter.

The state attorney and Petitioner's trial attorney held extended plea negotiations before and during trial. During trial, the state attorney offered to reduce the charge to one count of second degree murder in exchange for Petitioner's plea of *nolo contendre* or guilty. In explaining this offer, Petitioner's trial attorney explicitily assured Petitioner that Petitioner would be eligible to earn administrative gain time and "good time" which would be applied to reduce his sentence after Petitioner completed any minimum mandatory portion of Petitioner's sentence.

Based on his trial counsel's assurances, Petitioner agreed to enter a plea of *nolo contendre* to second degree murder. Petitioner materially relied on his future eligility for administrative gain time and a possibility of a decreased sentence under section 944.276, Florida Statutes (1987) in deciding to agree to enter a plea of *nolo contendre*.

On December 10, 1987, the Circuit Court of the Eighteenth Judicial Circuit, Brevard County, Florida, accepted the negotiated plea under which the petitioner pleaded nolo contendre to second degree murder.

On January 14, 1988 the trial court sentenced Petitioner to a term of incarceration of twenty years, including a three year minimum mandatory sentence for use of a firearm. Petitioner was accredited with 250 days towards his sentence for time previously served.

Petitioner is currently confined at Polk Correctional Institution pursuant to that judgment and sentence.

There are no other sentences, concurrent or consecutive, pending against Petitioner. Petitioner was eligible at the time of his conviction for administrative gain time under section 944.276, Florida Statutes (1987), excluding the three year minimum mandatory portion of the sentence.

Section 944.276(1) Florida Statutes (1987) provided that when the inmate population reached 98 percent of lawful capacity the Secretary of the Department of Corrections [DOC] had authority to award up to 60 days administrative gain-time to all inmates who were earning incentive gain time. The DOC Secretary awarded administrative gain-time to all eligible DOC inmates from February 16, 1987 until June 30, 1988.

On June 18, 1988 the Florida Legislature repealed section 944.276 and substituted the Provisional Credits Act. Act of June 18, 1988, ch. 88-122, §5, 1988 Fla. Laws 527, 535 (codified, as amended, at § 944.277, *Fla. Stat.* (Supp. 1988-1991)). The 1988 Act lowered the triggering percentage from 98 percent to 97.5 percent and required the DOC to give credits to all eligible inmates earning incentive gain time. Act of June 18, 1988, ch. 88-122, §5, 1988 Fla. Laws 527, 535 (codified, as amended, at § 944.277(1),(4) *Fla. Stat.* (Supp. 1988-1991)). DOC immediately began awarding provisional credits and continued to do so until the section 944.277 Florida Statutes was repealed in 1993.

On May 8, 1990 Petitioner completed his three year minimum mandatory sentence and the DOC began to award Petitioner both incentive gain time for meritorious behavior and provisional credits under the 1988 Provisional Credits Act.

The DOC awarded Petitioner a total of 420 days (1 year, 1 month and 25 days) provisional credits between May 8, 1990 and January 1991 in addition to Petitioner's accrued incentive gain time. Petitioner's provisional release date was August 23, 1998 based on provisional credit days actually awarded to Petitioner through January 1991.

Effective July 6, 1992, the Florida Legislature amended Section 944.277(1) and excluded persons incarcerated for second-degree murder from provisional release credit eligibility. The statute did not state it was to be applied retroactively.

On December 29, 1992 the Attorney General of Florida, Bob Butterworth, issued Attorney General Opinion 92-96. 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1993) 1992 Annual Report of the Attorney General of Florida 283. The Attorney General interpreted the 1992 amendments to the provisional release law to require the DOC to apply the exclusions in section 944.277 (1) (h) and (i) retrospectively to all inmates in the custody of the DOC on July 6, 1992. *Id.* at 288. In addition the Attorney General instructed the DOC to void all provisional credits previously awarded to offenders covered by section 944.277(1) (h) and (i). *Id.*

On May 7, 1993, pursuant to the Attorney General's opinion, the DOC applied the amended exclusions retroactively and revoked Petitioner's 420 accumulated days of provisional release credits and canceled Petitioner's provisional release date of August 23, 1998. The DOC canceled Petitioner's accumulated provisional release credits without notice to Petitioner or opportunity for hearing by the Petitioner.

On June 17, 1993 the Florida Legislature's Safe Streets Initiative of 1994, ch. 93-406, §§ 32, 35, 44, 1993 Fla. Laws 29 (§35 to be codified at § 944. 278, Fla.

Stat. (1993) became effective. Section 35 of the Safe Streets Initiative of 1994, codified at section 944.278 Florida Statutes (1993), canceled all administrative and provisional credits awarded under prior overcrowding credit statutes.

Had the Petitioner's credits not been canceled by the DOC, pursuant to the Attorney General's opinion, they would have been lost due to provisions of section 944.278 Florida Statutes (1993).

As a direct result of the retroactive application of section 944.277(1)(i) Florida Statutes (Supp. 1992) and the passage of section 944.278 Florida Statutes (1993). Petitioner's sentence is 420 days longer than it would have been under the statute that was in force when he was sentenced.

Additionally, Petitioner has lost the opportunity to continue to earn provisional credits as he was eligible to do under section 944.277, Florida Statutes (Supp. 1988-1991) at the time he was sentenced. Petitioner would be entitled to immediate release if Petitioner had continued to accrue provisional credits through the present.

Respondent Singletary is the Secretary of the Florida Department of Corrections and is ultimately responsible for Petitioner's custody.

REASONS FOR GRANTING THE WRIT

1. Question 1 above stated: Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277 (1) (i), Florida Statutes (Supp. 1992), to offenses committed before the effective date of the statute and the effect of the passage of section 944.278, Florida Statutes (1993) violate the prohibition against *ex post facto* laws in Article I, Section 10, Clause 1 of the United States Constitution.

This Court should grant certiorari to settle a conflict in application of the law of this Court, uphold a fundamental federal right, and determine an issue of great public importance.

Article I of the Untied States Constitution mandates that no State shall pass any "Ex Post Facto Law." *U.S. Const.*, art. I section 10 cl. 1. This Court has held that this basic statement of law is to ensure that citizens receive notice of the substance and effect of the laws of the land and allows individuals to rely on their content and meaning. *Weaver v. Graham*, 450 U.S. 24, 28 (1981); *Dobbert v. Florida*, 432 U.S. 282, 298 (1977).

This Court has previously instructed the State of Florida that a law is in violation of the *ex post facto* clause if it (1) is retrospective in that it applies to events which took place before its passage and (2) disadvantages the individual affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Miller v. Florida*, 482 U.S. 423, 433-34 (1987).

The provisions of both Section 944.277, Florida Statutes (1992) and 944.278 Florida Statutes (1993) are retroactively applied to inmates who were convicted for acts committed before the effective date of the statutes. Additionally, both statutes, as applied, and on the face of section 944.278, add new consequences to acts committed before the effective date of the statutes. Thus both provisions make Petitioner ineligible to serve a shorter sentence for which he was previously eligible.

The effect of the retroactive legislation dramatically alters the prison sentence to be served by the Petitioner. Petitioner has lost 420 days of credits and the potential to earn additional credits each month that the prison system remains at 98% capacity and for which he earns incentive gain time. The effect of serving the increased time is additional punishment retroactively applied to the Petitioner.

This Court has held that a retroactive decrease in the amount of gain time Florida inmates could earn was in violation of the *Ex Post Facto* Clause. *Weaver v. Graham*, 450 U.S. 24, (1981). Because Weaver and like inmates would serve a longer sentence under the retroactive application of the gain time statute, this Court found that the gain time scheme was a determinant of the sentence length. *Id.* Thus the petitioner was retroactively disadvantaged by the new scheme and the law was struck down as *ex post facto*.

The issue of retroactive ineligibility for overcrowding credits has been previously ruled on by the Tenth Circuit in *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991).

The facts of *Arnold* are virtually identical to the facts presented in the instant case. In that case the Tenth Circuit ruled that amendments to the Oklahoma Prison Overcrowding Emergency Powers Act, Okla.Stat. tit. 57 §§ 570-576 as applied, violated the ex post facto clause by making that petitioner retroactively ineligible for overcrowding credits. *Arnold v. Cody*, 951 F.2d 280, 281 (10th Cir. 1991).

The *Arnold* court relied on the judicial authority of *Weaver v. Graham, supra*, and applied the factors that are listed in that case. *Arnold* at 281. The Tenth Circuit held that the amendment to the statute met both requirements. *Id.* at 283. The amendment applied retroactively and the effect of the additional eligibility requirement was disadvantageous to that petitioner. *Id.* The amendment foreclosed the possibility of a shortened prison stay, which the petitioner was entitled to under the law in effect at the time he committed the offense. *Id.* The fact that the statute was enacted to alleviate overcrowding was not found to be significant. *Id.*

The Supreme Court of Florida has also recently ruled on this issue, in a *pro se* case. *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994). However, the outcome of that case is contra to the law as applied in *Arnold*. In *Griffin* the Florida court found that the application of section 944.277 (1992) was not an unconstitutional violation of the *ex post facto* clause. This ruling is in error and requires review by this Court.

Although the *Griffin* court correctly cites *Weaver* as the controlling law it fails to apply the test clearly set out in *Weaver*. *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994). Instead of analyzing whether the law was applied retrospectively and whether its effects disadvantaged the petitioner, the Florida court relies on irrelevant factors which this Court and other federal courts have ruled to be impermissible considerations in an *ex post facto* analysis.

In *Griffin* that court includes findings that administrative and provisional credits are not subject to the *ex post facto* prohibitions because the credits are "not a reasonable quantifiable expectation at the time the inmate is sentenced". *Id.* at 501. Additionally, that court holds in *Griffin* that provisional credits are an "inherently arbitrary and unpredictable possibility that is awarded based solely on the happenstance of prison overcrowding". *Id.* However the *Weaver* factors are not applied to the facts in *Griffin*.

Additionally, the *Griffin* opinion incorrectly relies on the predictability of an award of overcrowding credits. In an Eleventh Circuit case, that court stated that it is not the duty of the court to speculate on the possibility of the award of gain time but merely determine whether there is an *opportunity* to shorten the time spent in prison. *Raske v. Martinez*, 876 F.2d 1496, 1500 (11th Cir. 1989), *cert. denied*, 493 U.S. 993, 110 S. Ct. 543, 107 L. Ed. 2d 540 (1989) (emphasis added).

The law at issue created such an opportunity. The prison system in Florida has been historically overcrowded. *e.g. Costello v. Waignwright*, 397 F. Supp. 20 (M.D. Fla 1975), *rev'd* 430 U.S. 325 (1977). The Legislature

created the overcrowding credit statutes to alleviate the overcrowding. Not only was there an opportunity to earn credits, credits were awarded to eligible inmates over a period of years. Additionally, those entering into plea bargains were aware of the awards of overcrowding credits and took this into consideration when making their decisions to plead guilty or no contest. Like the Petitioner, these inmates were aware that the prison system was overcrowded and that this was the method DOC had employed to alleviate that problem. The overcrowding credit statute in effect at the time Petitioner entered a change of plea and was sentenced, gave him a clear opportunity to shorten his time spent in prison.

The *Griffin* decision also relies on the assertion that the overcrowding credits were in no way part of the original sentence. *Griffin* at 501. This has been held to be a non-determinative inquiry. *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). This Court in *Weaver* held that it need not determine that the prospect of gain time is a part of the sentence, it must only be a determinant of the prison term and because of the retroactivity of the law the sentence to be served has been lengthened. *Weaver* at 32, 101 S. Ct. 960, 67 L. Ed. 2d 17.

The *Griffin* opinion does not analyze the effects of the law which place section 944.277 Florida Statutes (Supp. 1992) and section 944.278 Florida Statutes (1993) in violation of the *ex post facto* prohibitions. Instead the opinion is based on a new analysis of possibilities and likelihoods of an award of overcrowding credits.

The *Arnold* case is correctly decided and accurately states the law found in *Weaver* and other federal cases. The opinion of the Florida Supreme Court is in direct conflict with the Tenth Circuit and fails to properly apply the applicable federal law. The law set out in *Griffin* which was the basis for the Florida Supreme Court's denial of the Petitioner's Writ of Habeas Corpus requires the review of this Court.

This Court should grant certiorari in order to settle the conflict of law between the Tenth Circuit and the highest court of the State of Florida and also to protect a fundamental federal right.

2. Question 2 above stated: Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277 (1) (i), Florida Statutes (Supp. 1992) and Section 944.278 Florida Statutes (1993), is an unconstitutional violation of the prohibition against bill of attainder contained in Article I, Section 10, of the United States Constitution.

This past term this Court once again identified Bills of Attainder as examples of prohibited retroactive legislation. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994). This Court should grant certiorari in this case and uphold that principle of law in order ensure a basic federal right.

The United States Constitution provides that "[n]o state shall...pass any Bill of Attainder..." A legislative act is a bill of attainder if it: (1) inflicts punishment, (2) against identifiable individuals, (3) without judicial trial. *Selective Services System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-847 (1984). The cancellation of Petitioner's provisional credits by retroactive application of section 944.277 Florida Statutes (Supp. 1992) and section 944.278 Florida Statutes (1993) is punishment by an increase of prison terms against individuals, like Petitioner, who were already incarcerated, without judicial trial.

This Court has ruled that an act is punishment under the jurisprudence of bill of attainder if it either: (1) falls within the historical category of punishment, (2) functionally furthers no non-punitive legislative purposes, or (3) the legislative history shows a motivational intent to punish. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 473-484 (1977).

Increase in prison term through cancellation of provisional credits falls under the first test as a historical category punishment. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

The retroactive cancellation of provisional credits section 944.277 Florida Statutes is directed against only the identifiable individuals consisting of

Department of Corrections inmates who fell within one of the amended categories of exceptions. The cancellation of credits through section 944.278 Florida Statutes was directed at the identifiable group of all Department of Corrections inmates.

Both the Attorney General's 1992 opinion interpreting section 944.277, Florida Statutes (1991) and the passage of section 944.278 Florida Statutes (1993) were initiated in response to the current unpopularity of the early release programs. Attorney General Opinion 92-96 was released in response to the public outrage over the pending release of a notorious criminal, Donald McDougall. *Op. Att'y Gen. Fla.* 92-96 at 283 (1992). See also, Roger Handberg and N. Gary Holten, *Reforming Florida's Sentencing Guidelines* 82 (1993) (discussing political response to McDougall controversy); Barbara Walsh, *Inmates Identify A Secret State Rounding Up Wrongly Released*, Sun-Sentinel, January 15, 1993, at 1B (quoting Attorney General Butterworth: "The McDougall case woke everybody up. Society has no use for violent offenders.")

Section 944.278 Florida Statutes (1993) was passed shortly after the McDougall incident in response to public outcry against early release of prisoners. Roger Handberg and N. Gary Holten, *Reforming Florida's Sentencing Guidelines* 82 (1993).

Finally, the statutes at issue retroactively changed eligibility for provisional credits and retroactively canceled all provisional credits already awarded causing an increase in prison term without the benefit of a judicial trial.

The Florida Supreme Court's denial of the Petitioner's Writ of Habeas Corpus was in error and requires review from this Court to preserve an important federal right.

3. Question 3 above stated: Whether Section 944.277 (1) (i), Florida Statutes (Supp. 1992) and Section 944.278 (1993), which destroyed Petitioner's liberty interests in granted provisional credits, destroyed his liberty interest in release on his provisional release date, and destroyed his property interests in the procedures for revocation of his liberty interest, on its face or as applied to the Petitioner deprives the Petitioner of liberty and property without fair notice and procedure in violation of the Fourteenth Amendment to the United States Constitution.

This Court should grant certiorari to ensure the fundamental right of constitutional due process.

The Fourteenth Amendment, *U.S. Const.* amend. XIV, section 1, precludes arbitrary deprivations of liberty and property interests and mandates that any deprivation of those interests to be accomplished only through fair, federally prescribed procedure. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-31 (1982); *Wolff v. McDonnell*, 418 U.S. 539, 555-58 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973).

This Court has held that a liberty interest may arise from two sources, the Due Process Clause and the laws created by a state. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1988), *Wolff v. McDonnell*, 418 U.S. 539, 557 (1973). A state creates a protected interest when the language of the provision provides "substantive predicates" to guide the officials' discretion. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1988).

Said language must contain mandatory language giving directives to guide the acts of the official once the "substantive predicate" has been met. *Id.*

The statutes and rules at issue in this case contain the necessary mandatory language which require a substantive predicate and mandate a certain outcome. Chapter 944, Florida Statutes provides that when the

prison population reaches a certain capacity the Secretary of the Department of Corrections has the authority to award provisional credits. Section 944.277(1). Once the decision to award credits is made the Secretary must award credits to each eligible inmate who is incarcerated on the date of the award and who is earning incentive gain time. That section also mandates that a provisional release date be established for each inmate. Section 944. 277(4) *Fla. Stat.* (Supp. 1988 - Supp. 1992). Any inmate who has received thirty or more days of provisional credits "must be released" on his or her provisional release date. Section 944.277(5) *Fla. Stat.* (Supp. 1988 - Supp. 1992).

The Department of Corrections administrative rules echo the mandates found in the Florida statutes. Sections 33-28.0019(1), 33-28.002, *Fla. Admin. C.* (1992).

The nature of provisional credits do not differ in any substantial way from the other types of gain time in which this Court has found a liberty or property interest deserving of due process protection. Although the main task of the provisional credits system was to alleviate prison overcrowding, the effort put forth by the inmate to obtain the provisional credits and the effect of the award of credits to the inmate are identical to that of incentive gain time.

In order to earn provisional credits the inmate must also qualify for incentive gain time. Section 944.277 *Fla. Stat.* (Supp. 1988 - Supp. 1992). Thus it is pivotal that the inmate be on his or her best behavior and that he or she attempt to participate in work or educational programs as they become available. Once credits were awarded, the inmate received a new provisional release date giving him or her an earlier date for release from incarceration. Effectively the Petitioner and other inmates like him demonstrated good behavior and were rewarded for that behavior with a shortened sentence.

The language used by the legislature and the Department of Corrections in these statutes and agency rules create a presumption that credits will

be awarded and inmates will be released when certain conditions exist. By employing such language the State has created a liberty interest in the provisional release credits. *Kentucky Department of Corrections of Corrections v. Thompson*, 490 U.S. 454, 460 (1988).

This Court has held directly on point, that "where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length on imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily."*Superintendent, Mass. Correctional Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985).

Once a liberty or property interest is created by the State that interest may be revoked only through constitutional notice, opportunity to be heard and written justification.*Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1973).

In violation of the procedural due process clause of the United States Constitution, the Petitioner was afforded no notice, opportunity to be heard or written justification for the acts taken. The Respondent's summary cancellation of those credits was an erroneous and arbitrary act which the due process clause protects against.

This Court should grant certiorari to uphold the Petitioner's federal right under the Due Process Clause of the United States Constitution and to decide a question of great public importance.

CONCLUSION

This Court should issue the Writ for review of the questions presented above.

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Decision of the Florida Supreme Court
in the underlying appeal A1

SUPREME COURT OF FLORIDA

Thursday, September 15, 1994

RUSSELL CALAMIA,
Petitioner,

v. CASE NO. 84,088

HARRY K. SINGLETARY, JR.,
ETC,.

Respondent.

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The Petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petition be and the same is hereby ordered denied.

GRIMES, C.J., OVERTON, SHAW,
HARDING and WELLS, JJ., concur

Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

No. 94-1059

IN THE

Supreme Court of the United States

October Term, 1994

RUSSELL CALAMIA,

Petitioner,

v.

HARRY K. SINGLETARY, JR., Secretary,
Florida Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent differs with Question 3 as framed by the Petitioner in that it presumes that Petitioner possessed a liberty interest in receiving and retaining early release credits allocated solely to alleviate prison overcrowding.

It is the Respondent's position that Question 3 should be characterized as follows:

> 3. Whether Florida's overcrowding statutes, in particular, Section 944.277, Florida Statutes, created protected liberty interests in retaining early release credits allocated solely due to prison overcrowding such that retroactive cancellation of those credits under either Section 944.277(1)(i), Florida Statutes (Supp. 1992) and Section 944.278, Florida Statutes 1993), deprived Petitioner of his liberty without fair notice and procedure in violation of the Fourteenth Amendment to the United States Constitution.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 10 provides in pertinent part:

> Section 10. No state shall...pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts....

United States Constitution, Amendment XIV, Section 1 provides in pertinent part:

> Section 1...nor shall any State deprive any person of life, liberty, or property, without due process of law....

◆ ◆ ◆

Florida Statutes Section 944.277(1)(i) (Supp. 1992), provides in pertinent part:

> Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity, the Secretary of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:
>
> * * *
>
> (i) Is convicted, or has been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.04(1), (2), (3), or (4); or has ever been convicted of any degree of murder in another jurisdiction....

Florida Statutes Section 944.278 (1993), provides in pertinent part:

> All awards of administrative gain-time under s. 944.276 and provisional credits under s. 944.277 are hereby canceled for all inmates serving a sentence or combined sentences in the custody of the department, or serving a state sentence in the custody of another jurisdiction.

STATEMENT OF THE CASE

I. Historical Background of Florida's Overcrowding Statutes

Since 1983, the State of Florida, like several other states, has enacted a series early release statutes specifically and solely designed to alleviate an overcrowding crisis which has plagued the state prison system over the last decade. In the face of a federal court consent decree on overcrowding and delivery of health services in the Florida prison system, the Legislature opted to afford the Department of Corrections an emergency relief procedure to preclude the mass release of Florida inmates at the direction of the federal courts. *See Costello v. Wainwright,* 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd,* 525 F.2d 1239 (5th Cir. 1976).

The first early release statute (Florida Statutes Section 944.598), enacted in 1983 and repealed in 1993, provided for the mandatory grant of emergency gaintime to all inmates within the prison system if the threshold of 99% of lawful capacity was reached. That statute was never implemented. Later overcrowding statutes administered by the Florida Department of Corrections (Florida Statutes Sections 944.276 and 944.277), enacted in 1987 and 1988, respectively, provided for the discretionary grant of credits to all inmates who met the criteria for such awards and who were not otherwise excluded by the statutes. The threshold levels required to trigger awards under these later statutes were below the 99% level of the original emergency release statute.

As the overcrowding crisis subsided and in light of the grave concern for public safety, the Florida Legislature began to narrow the categories of prisoners eligible for overcrowding release and exclusions were added to the statutes. Prisoners convicted of murder offenses were not initially among the excluded classes under any of the overcrowding statutes. In 1989, the Florida Legislature removed

from eligibility for early release for overcrowding any prisoner convicted of a murder offense. § 944.277(1)(i), Fla. Stat. (Supp. 1990). However, this provision did not seek to remove earlier allocations of overcrowding credits. In 1992, the Florida Legislature reenacted the statutory exclusion for murder offenses, this time giving the provision retroactive effect. *See* 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992). The following year, the Florida Legislature repealed the overcrowding statutes administered by the Florida Department of Corrections and mandated that all overcrowding credits previously allocated to prisoners who remained in custody be cancelled. § 944.278, Fla. Stat. (1993).

II. Statement of The Case

Respondent does not accept the Petitioner's statement of the case.

In five paragraphs contained on pages 2 and 3 of the Statement of The Case, Petitioner discusses his negotiated plea and the representations of defense counsel relative to early release credits and "goodtime" upon which Petitioner allegedly relied in accepting the plea. The Secretary of the Department is not privy to the plea proceedings and, therefore, cannot verify the authenticity of the allegations surrounding the negotiated plea. However, it is the Respondent's position, as a matter of state law, that the plea negotiations are wholly separate and unrelated to the department's administration of the overcrowding statutes and irrelevant to any determination of whether the statutes constitute a violation of the *ex post facto* clause or the prohibition against bills of attainder. *See Griffin v. Singletary,* 638 So. 2d 500 (Fla. 1994) (provisional credits are not a reasonably quantifiable expectation at the time an inmate is sentenced...[but] are an inherently arbitrary and unpredictable possibility that is awarded based solely on the

happenstance of prison overcrowding..., provisional credits in no sense are tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea).

In paragraph 4 at page 3, Petitioner incorrectly claims that at the time of his conviction he was eligible for administrative gaintime, a form of overcrowding credit under Florida Statutes Section 944.276. Respondent submits that Petitioner was neither eligible for any "goodtime" gain-time under Florida Statutes Section 944.275 or any form of early release due to prison overcrowding due to the imposition of a three-year mandatory provision which did not lapse until May 8, 1990. *See* § 775.087(2), Fla. Stat. (1987); § 944.276(1)(a), Fla. Stat. (1987).

In paragraph 5 at page 3, Petitioner mischaracterizes the operation of Florida Statutes Section 944.277 as a mandatory obligation of the department to award early release credits once the prisoner population reached 97.5 percent of lawful capacity. On the contrary, section 944.277 accorded *full discretion* to the Secretary of the Florida Department of Corrections on whether *any* overcrowding credits would be allocated when the triggering threshold was met. In that same paragraph, Petitioner erroneously states that the department allocated overcrowding (provisional) credits under section 944.277 from July 1988, when the statute became effective, until June 1993, when the statute was repealed. In actuality, the department made its last award of provisional credits in January 1991, when the Florida Parole Commission became responsible for controlling prison overcrowding through control release under Florida Statutes Section 947.146.

In paragraphs 3 and 4 at page 5, Petitioner incorrectly states that, as a result of the retroactive cancellation of overcrowding credits previously allocated under section

944.277, his sentence is 420 days longer than it would have been "under the statute that was in force when he was sentenced". Respondent first submits that Petitioner's sentence is no longer than originally meted out at sentencing in January 1988 — that is, twenty years. Additionally, Respondent points out that the 420 days of overcrowding credits retroactively cancelled were allocated Petitioner pursuant to the provisional credits statute that became effective on July 1, 1988 — more than two years after Petitioner committed his crime and approximately six months after Petitioner pled and was sentenced for his crime. Clearly, section 944.277 (provisional credits) was not in effect at the time Petitioner committed his crime or was sentenced. Rather, section 944.276 (administrative gain-time) was in effect and Petitioner was deemed ineligible for early release due to prison overcrowding under that statute until he fully served the mandatory minimum term. Petitioner did not achieve the potential eligibility for early release due to prison overcrowding until satisfaction of the mandatory term in May 1990. After that time, Petitioner was allocated 420 days of provisional credits in anticipation that his release may be necessary to control prison overcrowding; however, Petitioner never achieved release due to prison overcrowding, and the overcrowding mechanism was repealed and credits were cancelled in June 1993.

Finally, the Secretary denies that Petitioner would be eligible for release from custody at this time even if his opportunity for release due to prison overcrowding had not been cancelled.

SUMMARY OF ARGUMENT

The state and federal courts within the Eleventh Circuit have consistently held that Florida's early release statutes enacted for the purpose of controlling prison overcrowding are procedural statutes, which do not affect "substantial personal rights" relating directly to the definition of crimes, defenses or punishments, and, therefore, changes in their provisions do not violate the ex post facto clauses of the United States Constitution. Although there is one federal circuit court decision out of the Tenth Circuit which conflicts with the precedent of the Eleventh Circuit, the Tenth Circuit case is premised on a faulty *ex post facto* analysis and does not provide a basis for review by this Court in light of the overwhelmingly consistent decisional law of the state and federal courts of the Eleventh Circuit.

Florida's overcrowding statutes were enacted in response to a federal mandate achieved through a consent agreement capping the prison population. The legislation was civil, not penal, in nature, solely dedicated to addressing prison overcrowding and not designed as benefit or entitlement to Florida's prisoners. When the prison overcrowding crisis began to wane, the Florida Legislature repealed the overcrowding control mechanisms and cancelled any further early releases. The retroactive cancellation of overcrowding credits by the Florida Legislature furthers an important and non-punitive legislative purpose and is completely devoid of a motivational intent to punish. As such, this legislation does not violate the constitutional proscription against bills of attained.

Finally, the legislative history of the overcrowding statutes makes it clear that this legislation was not intended as an inmate benefit or entitlement. The Secretary of the Florida Department of Corrections retained full discretion on whether to implement the statutes in order to control prison overcrowding. The mandatory language of these

statutes was solely included to assure an orderly mechanism for administering early release due to overcrowding, by providing for a provisional release date for tracking purposes and an equal distribution base for efficient overcrowding control. Florida's prisoners had no legitimate or reasonable expectation that overcrowding would continue to afford them very early release from their sentences. This case raises no substantive due process issues or questions of great public importance that would warrant this Court's review.

For these reasons, the petition for writ of certiorari must be denied.

REASONS FOR DENYING THE WRIT

Question 1. Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277(1)(i), Florida Statutes (Supp. 1992), to offenses committed before the effective date of the statute and the effect of the passage of section 944.278, Florida Statutes (1993) violate the prohibition against *ex post facto* laws in Article I, Section 10, Clause 1 of the United States Constitution.

Review on writ of certiorari is a matter of judicial discretion rather than of right and certiorari will be granted "only when there are special and important reasons therefor." Rule 10, Rules of the Supreme Court of the United States. Thus, the burden is on the Petitioner to show some compelling and substantial reason to invoke the jurisdiction of this Court.

Petitioner suggests there is a substantial constitutional issue to be addressed in this case. Petitioner contends that the decision of the Florida Supreme Court in *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994) is in conflict with this

Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981) as well as the decisions of the Eleventh Circuit in *Raske v. Martinez*, 876 F.2d 1496 (11th Cir.), *cert. denied* 493 U.S. 993 (1989), and the Tenth Circuit in *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991).

The decisions in *Weaver* and *Raske* both applied an *ex post facto* analysis to legislation which altered eligibilities for "goodtime" gaintime awarded for a prisoner. "Goodtime" gaintime is distinguishable from credits allocated to control prison overcrowding in significant ways. Both basic and incentive gaintime relate to the sentence imposed, and a release date reduced by these awards can be reasonably predicted, based upon length of the term meted out. Basic gaintime is applied as a lump sum award to reduce the overall length of sentence the day the prisoner enters the prison gates. While not necessarily a part of the sentence in a technical sense, the award of basic gaintime is a quantifiable determinant of a prisoner's overall term, which, as the Supreme Court recognized in *Weaver,* may operate as a "factor...[in] the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Similarly, the potential to earn incentive gaintime for labor performed and constructive activities, although contingent upon performance and good behavior, is also quantifiable based upon length of sentence imposed. Thus, to the extent that these two types of "gaintime" operate in tandem with the length of sentences imposed, they affect the "quantum of punishment" which attaches at the time the crime is committed. Conversely, the eligibility and receipt by a prisoner of early release awards, whether those awards are called "gaintime", "credits", "allotments", etc., is in no way tied to the overall length of sentence. The need for and application of such awards are contingent upon many outside variables which contribute to prison overcrowding. There is no relationship to the original penalty assigned to the crime at the time it was committed nor to the ultimate

punishment meted out. The sole purpose of the early release statutes is to provide a temporary mechanism to alleviate the administrative crisis created by prison overcrowding while continuing to protect the public from violent offenders. Florida's overcrowding statutes are procedural in nature — their purpose directed to alleviating the administrative crisis of prison overcrowding — not to the traditional purposes of punishment. Consequently, Florida's overcrowding statutes create no "substantial personal rights" relating directly to the definition of crimes, defenses, or punishments, as defined and limited by this Court's decision in *Collins v. Youngblood*, 497 U.S. 37 (1990).[1]

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1 It is worthwhile to note that at least two justices writing separate opinions in the *Weaver* decision found the case to be a close call the on ex post facto analysis. In particular, Justice Blackmun was compelled to concur in the judgment solely because of prior precedent in *Lindsey v. Washington*, 301 U.S. 397 (1937) and the summary disposition in *Greenfield v. Scafati*, 277 F. Supp. 644 (Mass. 1967), *aff'd*, 390 U.S. 713 (1968). However, Justice Blackmun noted that:

> Were the Court writing on a clean slate, I would vote to affirm the judgment of the Supreme Court of Florida, My thesis would be: (a) the 1978 Florida statute operates only prospectively and does not affect petitioner's credits earned and accumulated prior to the effective date of the statute; (b) "good time" or "gain time" is something to be earned and is not part of, or inherent in, the sentence imposed; (c) all the new statute did was to remove some of the petitioner's hope and a portion of his opportunity; and (d) his sentence therefore was not enhanced by the statute.

Weaver, 450 U.S. at 36-37.

In rendering its decision in *Youngblood*, this Court sought to restore the proper scope of the Ex Post Facto Clause. Significant to this case is the fact that the *Youngblood* Court specifically rejected the ex post facto test earlier defined in *Kring v. Missouri*, 107 U.S. 221 (1883), as one "which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." This is precisely the test which Petitioner suggests this Court use in analyzing his ex post facto challenge. However, *Youngblood* makes clear that the language cited in *Kring* was never intended "to mean that the Constitution prohibits retrospective laws, other than those

Very recently, the Eleventh Circuit affirmed the state's characterization of its prison overcrowding statutes as non-substantive, procedural mechanisms. *See Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995). In *Hock*, the petitioner claimed his rights under the *ex post facto* clause were being violated because he was no longer being awarded provisional credits (due to prison overcrowding) under section 944.277[2] and he was determined ineligible for control release, the state's latest mechanism for controlling prison

encompassed by the Calder categories, which 'alter the situation of a party to his disadvantage.'" *Youngblood*, 491 U.S. at 49-50.

Since *Youngblood* was rendered, this Court has not considered a case involving "good-time" credits so its impact on the *Weaver* decision remains unknown; however, on the five previous occasions on which the Court has considered certiorari petitions raising ex post facto challenges to Florida's early release statutes and has declined to accept any of those petitions for review, thus leaving the decisions of the courts of this state and circuit intact. *See Woolworth v. Dugger*, 542 So. 2d 1335 (Fla. 1989), *cert. denied*, 493 U.S. 827 (1990); *Stafford v. Singletary*, ___F.2d___, *cert. denied*, 111 S.Ct. 2801 (1991); *Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991), *cert. denied, sub. nom. Rodrick v. Singletary*, ___U.S.___, 112 S.Ct. 886, 116 L.Ed.2d 790 (1991); *Felk v. Singletary*, 589 So. 2d 905 (Fla. 1991), *cert. denied*, ___U.S.___, 112 S.Ct. 1961, 118 L.Ed.2d 563 (1992); *Gorham v. Singletary*, 624 So. 2d 266 (Fla. 1993), *cert. denied*, ___U.S.___, 114 S.Ct. 1193 (1994).

In any event, *Youngblood* demands that a line be drawn on the expansion of the Ex Post Facto Clause. Assuming that the decisions in *Weaver v. Graham*, 450 U.S. 24 (1981) and *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), can withstand the *Youngblood* scrutiny, the line must and should be drawn in extending ex post facto prohibitions to early release mechanisms which provide a temporary remedy for alleviating the administrative crisis of prison overcrowding and which are in no way related to the ultimate punishment meted out but are contingent on many outside variables which contribute to prison overcrowding.

2 Hock's ineligibility for provisional credits resulted from the enactment of Florida Statutes Section 947.146, an early release mechanism that supplanted the provisional credits statutes. Although Hock received provisional credits while Florida Statutes Section 944.277 was in effect, he was statutorily ineligible to be released early under section 947.146 (control release).

overcrowding. While the Eleventh Circuit acknowledged that Florida's supreme court had explicitly recognized that Florida's early release statutes are "procedural in nature, [and] are not directed toward the traditional purposes of punishment", *Hock*, 41 F.3d at 1472, citing *Dugger v. Rodrick*, 584 So. 2d 2, 4 (Fla. 1991), *cert. denied sub nom. Rodrick v. Singletary*, ___U.S.___, 112 S.Ct. 886, 116 L.Ed.2d 790 (1992), the court went on to conclude that, independent of the Florida authorities, "any disadvantage suffered by the petitioner does not affect punishment and therefore does not violate the Ex Post Facto Clause." *Hock*, 41 F.3d at 1472. The Eleventh Circuit further distinguished the cases dealing with early release credits from those addressing basic and incentive gaintime:

> The control release statute is quite different. it reduces an inmate's imprisonment automatically for the convenience of the Department of Corrections. The statute is procedural, not substantive like "good-time" gain time, and therefore is not ex post facto. *Rodrick*, 584 So. 2d at 4.
>
> Additionally, the retroactive application of control release does not actually disadvantage the petitioner by reducing his opportunity to shorten his time in prison. Because control release is based on an arbitrary and unpredictable determinant, the prison population level, an inmate has no reasonable expectation at the time he is sentenced that the prison population will reach the specified triggering level and that his incarceration will therefore be reduced.

Hock, 41 F.3d at 1472-1473.

While the *Hock* decision is indeed in conflict with the *Arnold* decision of the Tenth Circuit, *Arnold* is erroneously

grounded in the effect-based analysis of *Weaver, Miller,* and *Lindsey;* the focus is on the potential lengthening of incarceration. The *Arnold* court had for review an appeal from a federal habeas in which the Oklahoma prisoner challenged an amendment to Oklahoma's prison overcrowding statutes which reduced his eligibility for emergency release due to overcrowding. In *Arnold,* the Tenth Circuit relied on an earlier decision of the Oklahoma Court of Criminal Appeals, *Ekstrand v. Oklahoma,* 791 P.2d 92 (Okla.Crim.App.1990) (citing *Weaver*), in which the Oklahoma court addressed whether an amended Oklahoma statute relating to "earned" credits was an *ex post facto* law when its application to prisoners resulted in the computing of fewer earned credits than under the statute before the amendment, thereby lengthening the prisoners' sentences. *Id.* at 93. In *Ekstrand,* "[a]fter comparing the potential for earning credits before and after amendment, the [Oklahoma] court concluded that the amendment was disadvantageous". *Id.* at 94. Based on that factor, and that factor alone, the Oklahoma court declared the amendment in violation of the *ex post facto* clause.

In adopting *Ekstrand,* the Tenth Circuit rejected another decision of the Oklahoma Court of Criminal Appeals, *Barnes v. Oklahoma,* 791 P.2d 1010 (Okla.Crim.App.1990), in which Oklahoma, like Florida, drew a distinction between credits earned for good behavior, which were the subject of the *Ekstrand* decision and emergency credits meted out to alleviate prison overcrowding. Like Florida's courts and the federal district courts in this circuit, the Oklahoma court concluded that prison overcrowding was unrelated to a prisoner's crime and could not be viewed as a consequence attached to the crime at the time it was committed. As a result, eligibility for emergency release due to overcrowding never ventured into the realm subject to ex post fact analysis. The Tenth Circuit rejected the state court's determination of the nature of emergency overcrowding credits, finding no difference between "earned"

credits and "emergency" credits. Such a matter is a determination of state law that should not have been disturbed. When closely analyzed, the *Arnold* court's sole test for whether an *ex post facto* violation occurred was whether Arnold himself was disadvantaged. This factor alone is an incorrect test in assessing an ex post facto challenge.

This singular, conflicting decision is founded on an incorrect test and does not provide a compelling basis for this Court to review the consistent decisions of the state and federal courts within this circuit.

Question 2. Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277(1)(i), Florida Statutes (Supp. 1992) and Section 944.278, Florida Statutes (1993), is an unconstitutional violation of the prohibition against bill of attainder contained in Article I, Section 10, of the United States Constitution.

Petitioner asserts that the Court should review this case because Florida's enactment of retroactive legislation cancelling overcrowding credits and eliminating the possibility of very early release due to prison is an unconstitutional bill of attainder. As Petitioner notes, a legislative act may be a bill of attainder if it "legislatively determines guilt and inflicts punishment upon an indentifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). In assessing whether a challenged act constitutes punitive legislation, this Court has generally viewed three areas: (1) whether any feature of the act falls within the historical category of punishment, (2) whether the act functionally furthers no non-punitive legislative purpose, and (3) whether

the legislative history of the act shows a motivational intent to punish. *Id.* at 473-478.

The challenged legislation survives these tests.

Petitioner asserts that the two legislative provisions fall within the historical category of punishment simply because he was deprived of the opportunity for *very* early release and that he will now be required to serve the term of imprisonment as imposed. Petitioner incorrectly states that his prison term has been *increased* through cancellation of overcrowding credits. Petitioner's 20-year term remains intact, as does his tentative release date calculated due to application of "goodtime" gaintime for positive behavior. The fact that Petitioner will not achieve a very, very early release from his term of incarceration due to prison overcrowding, a factor totally unrelated to Petitioner's crime and the punishment meted out, simply cannot be viewed as a historical category of punishment.

Moreover, the retroactive cancellation of overcrowding credits by the Florida Legislature furthers an important and non-punitive legislative purpose and is completely devoid of a motivational intent to punish. Florida's overcrowding statutes were enacted in response to a federal mandate achieved through a consent agreement capping the prison population in the case of *Costello v. Wainwright*, 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1976). Without these statutes, the federal court system would have been saddled with effecting the release of Florida's prisoners. Florida did not abdicate its responsibility. The legislature sought ways to confront the burgeoning prison population including the increased building of prisons, the development of front-end diversionary programs, and amended sentencing guidelines. As an interim and temporary safety valve, Florida put in place early release mechanisms to offset the front-end flow of prisoners. When the

overcrowding crisis began to wane, the Florida Legislature appropriately terminated the overcrowding mechanisms and cancelled all further early releases in deference to public safety.

The legislation is civil, not penal, designed solely to contain prison overcrowding. Petitioner had no vested right or legitimate expectation that he would attain early release due to prison overcrowding. *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994); *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995). No doubt Petitioner feels personally disadvantaged because he failed to achieve the windfall of very early release from his prison term due to prison overcrowding, but potential unfairness of retroactive civil legislation to an individual or group of individuals does not in and of itself violate the constitutional proscription against bills of attainder.

Question 2 provides no basis for this Court to grant review.

Question 3 (Restated). Whether Florida's overcrowding statutes, in particular, Section 944.277, Florida Statutes, created protected liberty interests in retaining early release credits allocated solely due to prison overcrowding such that retroactive cancellation of those credits under either Section 944.277(1)(i), Florida Statutes (Supp. 1992) and Section 944.278, Florida Statutes (1993), deprived Petitioner of his liberty without fair notice and procedure in violation of the Fourteenth Amendment to the United States Constitution.

Petitioner claims that Florida has created a protected liberty interest in retaining overcrowding credits and that this Court must grant review to ensure the fundamental right of constitutional due process.

Florida's overcrowding statutes create no protected liberty interests and any mandatory language contained in those statutes was placed there solely to assure an orderly mechanism for controlling overcrowding. The only mandatory language in the administrative gaintime statute, the forerunner to the provisional credits statute at issue here, appears in the sentence that requires the Department of Corrections to certify that the system has reached 98 percent of lawful capacity as defined by s. 944.598. See §944.276(1), Fla. Stat. (1987).[3]

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3 Section 944.276(1) provided, in part:

> Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections *shall* certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary *may* grant up to a maximum of 60 days administrative gain-time equally to all inmates who are earning incentive gain-time.... (emphasis added)

However, this mandatory certification in no way required the Department to *award* administrative gaintime — rather, once the Governor acknowledged the certification in writing, then it was up to the secretary to decide whether to grant the early release credits or not.[4]

Similar language requiring a certification to the Governor appeared in the provisional credits statute; however, like the administrative gaintime statute, the decision on whether to grant any early release credits was up to the secretary of the department once the certification was acknowledged by the Governor. Additional mandatory language appeared in subsections (2), (3), and (4) of section 944.277; however, the language contained in these sections essentially assured an orderly mechanism for administering early release due to overcrowding, by providing for a provisional release date for tracking purposes and an equal distribution base for efficient overcrowding control. Without an orderly mechanism, it would not have been possible for the department to determine quickly and efficiently when the floor of 97% of lawful capacity was reached. Thus, the mandatory language was in place for the purpose of providing an orderly mechanism — not for the purpose of assuring or creating an inmate benefit or entitlement.

Petitioner improperly likens overcrowding credits to basic and incentive gaintime earned and awarded for good behavior. While the fact that a prisoner was earning incentive gaintime was a consideration in whether overcrowding

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4 The specific language of the statute is "the secretary *may* grant up to a maximum of 60 days...". Clearly there was no mandatory burden upon the secretary to award the gaintime after certification; however, once the decision was made to award the early release credits, it was incumbent upon the secretary to award it equally to all eligible inmates. To do otherwise would have made the system to cumbersome to effectively apply as daily calculations of prisoner population and capacity were necessary to monitor overcrowding.

credits were meted out to him on the particular date of allocation, this criteria was merely an indicia of whether the prisoner remained an acceptable risk for very early release into the community. A prisoner in no way earned overcrowding credits. The fact that some prisoners who were otherwise eligible for overcrowding credits may have performed better or exhibited good behavior as a result is nothing more than an incidental effect of the statutes. Neither Petitioner nor any other prisoner can create for himself a protected liberty interest simply because he is good.

There is no protected liberty interest at issue here nor a question of great public importance that would warrant this Court's review of the decision below.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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